Supreme Court, U.S.
FILED

98 1114 DEC 28 1998

OFFICE OF THE CLERK

No.____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

BURTON W. ONSTINE,

Petitioner,

v.

JUDITH A. RAMALEY, et al., individually and in their official capacities as employees of Portland State University

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment guarantees some form of due process to a tenured university professor, prior to, or at least after, his removal from his teaching duties and forfeiture of his pay and benefits.

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---

OPINIONS BELOW

The unpublished memorandum opinion, and dissent, are reproduced as Appendix (App.) A. The order denying the petition for rehearing is reproduced as Appendix B. The district court's opinion is unpublished.

JURISDICTION

The court of appeals entered its judgment on August 20, 1998. The court's order denying a rehearing was entered on September 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life Liberty, or property, without due process of law." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

It is somewhat unconventional to quote, verbatim, a dissenting opinion as the statement of the case. However, Professor Onstine could not devise a more succinct and accurate statement of the case than that of the dissent by Judge Ferguson. Thus, this Court's indulgence is requested. The proceedings below are contained in a brief paragraph at the conclusion of this section.

For thirty years, Professor Onstine taught at Portland State University and was in the words of his employer, a "valuable member" of the community. On March 7, 1995, he appeared at work disoriented and acting strangely. Based solely on this single incident, the university made the professor's position and salary contingent upon a mandatory psychiatric evaluation. The university couched this requirement in terms of the safety of students, the professor, and that of the general public.

However, there is no evidence to demonstrate that the professor posed any type of threat to anyone. In fact, on the day of the incident, university psychiatrists concluded that he was not dangerous to himself or others.

Without any process at all, the professor ends up on permanent unpaid sick leave. He has lost his salary, benefits, and the opportunity to continue work, all, it is worth repeating, without any process at all.

The majority excuses all this because of the existence of a collective bargaining agreement between the university and its employees. The agreement provides that it applies only when the aggrieved professor first files a grievance with the appropriate dean. Because Professor Onstine did not do that, the majority concludes that he has no right to a due process hearing. The majority cites Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992) for the proposition that a public employer may meet its due process obligations through general procedures established in a collective bargaining agreement. That case has no bearing here because in Armstrong, the only remedy that employees had was a collective bargaining agreement. Here the professor has a remedy under state law. Armstrong itself noted this distinction. It stated that in a case involving only a collective bargaining agreement, cases involving due process under state law are not applicable. The State of Oregon has detailed administrative rules, specifically for Portland State University, which are mandated by Oregon legislation. See Oregon Revised Statutes Chapter 351.

Section 577-41-010 of the Rules provides that professors may be sanctioned only for cause. The only grounds for cause stated in the rules which could possibly apply to Professor Onstine is a refusal to leave the university premises when ordered to do so because of posing a threat to personal safety, property, or activities on the premises. However, no one claims that the professor ever refused to leave when ordered to do so. In fact, no such order was ever made.

Section 577-41-015 requires that complaints which may warrant the imposition of sanctions must be filed in writing with the president of the university or his deputy. The complaint must be in writing and state specific facts which constitute grounds for the imposition of sanctions. The professor must be sent a copy of the complaint. The university must explore the possibility of a mutually acceptable resolution. If there is none, then the rules provide for a formal hearing.

Nothing mandated by state law was done in this case. No one can seriously contend that permanent sick leave without pay is not a sanction. Sanctions are defined at ADC 577-41-010(3) as follows: "Sanctions for cause include oral or written warning or reprimand, written censure, removal from an assigned post and reassignment, suspension for a period not to exceed one year, and termination." If an oral warning is a sanction, then certainly permanent unpaid sick leave is a sanction. The code then proceeds to mandate in detail the proceedings which must be held, none of which were conducted by the university. If the president finds that the continued performance of the professor poses a clear and present danger to the university, professor or

public, he may suspend the professor, without financial penalty, from some or all his duties. Only after a formal hearing process, including findings of fact and conclusions of law, can what was done to Professor Onstine be accomplished.

The majority concedes that the professor had a property interest in his job under Oregon law and that this property was taken away from him. The majority, however, decree that Professor Onstine was deprived of that interest by due process of law because he did not provide the university with a requested medical evaluation nor ask for a grievance proceeding under the collective bargaining agreement. However, the law of Oregon does not require Professor Onstine to do either. Oregon Law places the burden upon the university to establish the due process requirements. The professor need not do anything until the due process proceedings are in place.

Of course, the university and Professor Onstine could have agreed that the due process requirements of Oregon Law were waived and the parties could proceed under the collective bargaining agreement. However, that was never done, and the record is void of any suggestion that the matter was even considered by anyone.

Professor Onstine was deprived of his livelihood after thirty years of being a valued member of the academic community. The defendants denied the most fundamental basis of all law -- due process, which is equated with justice. The due process requirements that must be accorded college professors in Oregon are not insurmountable. All that must be done is to obey the law. I therefore dissent.

Proceedings Below

Professor Onstine's First Amended Complain was filed on November 11, 1996, in federal district court in Portland, Oregon. His complaint alleged violations of his civil rights under 42 U.S.C. § 1983, violations of his Fourteenth Amendment due process rights and violations of Oregon law.

The district court granted summary judgment dismissing Onstine's complaint in an unpublished opinion. Onstine appealed on June 6, 1997. On August 20, 1998, the Ninth Circuit filed its Memorandum opinion, affirming the district court, Judge Ferguson, dissenting. (App. A). On August 31, 1998, Onstine filed his Petition for Rehearing, based upon mistake of fact. On September 25, 1998, the Ninth Circuit denied the Petition. (App. B)

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has effectively rewritten Onstine's American Association of University Professors Collective Bargaining Agreement ("CBA"). In the vast Ninth Circuit, in virtually every AAUP contract (and, quite possibly, every single collective bargaining agreement in every profession) the grievance procedure is now the sole remedy for virtually every adverse situation facing a tenured employee, even though the adverse situation is unique, not covered by the collective bargaining agreement, or, as in this particular case, expressly excluded from the agreement, as shown below.

The Ninth Circuit's memorandum ignored the Fourteenth Amendment's Due Process Clause. It interpreted Oregon's Administrative Rules, governing due process procedures applied to ALL tenured employees, to exclude a situation in which administrators use the label "permanent sick leave without pay" to take away a tenured employee's work and pay. Virtually every State has similar administrative rules which require due process to take away one's livelihood. Now, those States no longer need follow their own State laws nor need the be bound by the due process clause of the Fourteenth Amendment.

The Decision of the Court of Appeals is Erroneous

Oregon's Attorney General adopted the litigation strategy of branding Onstine a psychotic trouble maker, This strategy must have worked because the district court granted the AG summary judgment upon a made up rationale The district court's opinion even acknowledged that there was no statutory nor common law authority to deny Onstine his work and pay, and ignored the Collective Bargaining Agreement -- but declined to give Onstine his job back. The Ninth Circuit majority, correctly, ignored the district court's opinion.

However, the majority concluded: "Because Onstine had the ability to seek redress through the CBA grievance procedures ... we find that Onstine was provided with all of the process due him under the Fourteenth Amendment, and we therefore affirm the lower court's grant of summary judgment for the defendants." (App. A p. 9)

Under a plain reading of the Collective Bargaining Agreement's grievance procedure, it was, is, and forever will be, unavailable because the grievance must result from the employer admitting that the employee must be "sanctioned." Respondents always insisted that removal of Onstine from his work and stopping his pay were not "sanctions." Thus, Onstine's grievance procedure referring to a right to grieve "sanctions" could not apply. And, now all administrators now have the perfect strategy, i.e., refuse to call whatever event they impose upon the hapless employee, a "non-sanction."

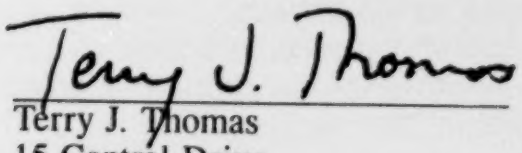
In Onstine's case, the CBA expressly excludes questions of a professor's "competence" from the grievance procedure. Since the majority concluded there have been no sanctions and the CBA expressly excludes questions of Onstine's competence, the majority's reliance on the CBA as providing "all the process that is due" to Onstine is erroneous.

CONCLUSION

This Court has held, numerous times, that the Fourteenth Amendment's due process clause guarantees some form of process, although due process "...unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and call for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S., 924, 930, 117 S.Ct 1807, at 1812, 138 L.Ed.2d 120 (1997)

No process cannot, ever, comply with any form of the Fourteenth Amendment's due process requirement. Review of the decision below can assure tenured employees have "such procedural protections as the particular situation demands."

Dated: December 22, 1998 Respectfully submitted



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APPENDIX A

A-1

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Cathy A. Catterson
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BURTON W. ONSTINE, Plaintiff-Appellant, vs. PORTLAND STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY; MICHAEL REARDON; RODERIC DIMAN; MARVIN KAISER; GARY L. SCOTT; MARY BETH COLLINS; CONRAD SEIBER, Defendants-Appellees.	)	No. 97-35639 D.C. No. CV-96-00460-DCA MEMORANDUM[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Oregon
Donald C. Ashmanskas, Magistrate Judge, Presiding

Argued and submitted July 9, 1998
Portland, Oregon

Before: ALARCON, FERGUSON, and BRUNETTI, Circuit Judges.

Appellant Burton W. Onstine, a tenured assistant professor of political science at Portland State University, appeals the district court's grant of summary judgment for the defendants, officials of the University, in his 42 U.S.C. § 1983 suit alleging violation of his procedural due process rights. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

The facts in the case are for the most part undisputed, and are as follows. On March 6, 1995, Onstine called in sick to the University for the following day, March 7, 1995, on which he was scheduled to teach. On March 7, 1995, Onstine showed up at the University exhibiting strange behavior. Witnesses claimed that he was talking like a duck, stalking furniture, clapping his hands in a dark room, dancing and singing down the hallway, talking about "going with the flow," making "whoosh" sounds, and engaging in conversations that did not make sense. Onstine did not attend his scheduled morning class.

In response to Onstine's behavior, defendant Scott, who was Onstine's immediate superior, contacted University security personnel who then contacted Dr. Conrad Seiber, a University psychologist. After consulting with Dr. Seiber and

another counselor, Onstine refused their suggestion to go to the hospital, but agreed to take a taxicab home. Onstine has not since returned to teach at the University.

Defendants Scott and Diman prepared a letter to Onstine, signed by Scott, and sent on March 10 and again on March 17, 1995, which read, in pertinent part:

> Your return to full-time responsibilities will be contingent upon providing me with a written evaluation of your condition made by a competent mental health professional. If this cannot be done by the beginning of classes for Spring term, i.e., by March 27, 1995, I will place you on sick leave.

On March 23, 1995, in response to Scott's letter, Onstine wrote to Scott:

> Thank you for your thoughtful letters of March 10, 1995 and March 17, 1995 received March 23, 1995.
>
> I deeply appreciate your concern for my welfare.
>
> I accept with alacrity your kind offer to place me on sick leave for Spring Term, 1995.

After receiving Onstine's letter, Scott did not have any further contact with Onstine until May 25, 1995, when he wrote Onstine regarding the 1995-96 academic year. Again Scott stated that before Onstine could return to teaching, he would be required to provide a written evaluation of his

mental condition. Scott requested that such an evaluation be submitted by August 1, 1995.

On August 8, 1995, having failed to receive an evaluation of Onstine's condition, Diman wrote Onstine a letter which read, in pertinent part:

> During the Sprint term 1995 you were placed on sick leave. The requirement was made that you provide an evaluation from a competent mental health professional as to your mental condition and the appropriateness of your returning to your full-time responsibilities for the fall quarter, 1995.
>
> I understand that you have not provided this documentation, and I must reiterate that it is necessary before you will be allowed to return to your duties.

Onstine responded by writing a letter to Scott proposing that Onstine "take a sabbatical at full pay for the Fall Term 1995 and another sabbatical Winter Term 1996 at full pay." Onstine further suggested that he would "be looking forward to a greatly reduced teaching load Spring Term 1996." Scott replied by letter dated August 21, 1995 that he could not discuss the possibility of sabbaticals or a reduced teach load until he received the written evaluation of Onstine's ability to return to work. Scott also noted that he assumed from Onstine's previous letter that Onstine would not be returning to teach during the Fall Term, and that Scott would therefore continue Onstine's sick leave.

On September 20, 1995, Diman sent Onstine a letter, stating as follows:

> The chair of your department has informed me that he has received no answer to his letter requesting that you provide him with a written evaluation of your ability to return to classroom duties.
>
> This is to inform you that, since we had not received the documentation of your ability to perform your responsibilities, effective September 16, 1995, you were again placed on sick leave, that we have designated your leave as Family Medical Leave, and that according to records in the Payroll Office, your accrued sick leave will run out December 8, 1995. If we do not hear from you, beginning December 9, 1995 through June 15, 1996 you will be placed on leave without pay. If by June 15, 1996 you have not contacted the University and provided the requested evaluation, we will proceed to terminate your employment.
>
> Please contact me to discuss this matter. You have been a valuable member of our community, and we want to help you any way that we can.

In November 1995, Onstine requested and received a psychiatric evaluation from Dr. David B. Jarvis. On November 18, 1995, Dr. Jarvis stated, in a letter addressed "To Whom it may concern," that he found "no medical/psychiatric reasons that would prevent [Onstine] from returning to full academic duties at this time." Onstine, however, never forwarded this letter to the University.

On December 1, 1995, Diman wrote Onstine a letter reminding him that he was about to exhaust his paid sick leave, and would be placed on leave without pay beginning

December 9, 1995. Diman also expressed his concern about Onstine's failure to get in touch with anyone at the University. On December 9, 1995, Onstine was placed on sick leave without pay, and he has remained on that status to the present date.

Onstine filed the present suit alleging under § 1983 that the defendants violated his Fourteenth Amendment procedural due process rights when they placed him on unpaid sick leave, in violation of the Oregon Administration Rules (OARs). The court below granted defendants' motion for summary judgment, and Onstine now appeals.

II.

The Fourteenth Amendment protects against the deprivation of property of liberty without procedural due process. Brady v. Gebbie, 859 F.2d 1543, 1547 (9th Cir. 1988). There is no dispute here that Onstine, as a tenured professor at Portland State University, had a property interest in his job under Oregon law. See Id. at 1549 (citing Papadopoulos v. Oregon State Bd. Of Higher Educ., 511 P.2d 854 (1973)). Thus, the only issue is whether he was deprived of this interest without due process of law.

"It is by now well-established that due process, unlike some legal rules, is not technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." Higgins v. Port of Newport, 121 F.3d 1281, 1283 (9th Cir. 1997) (internal quotation marks and citations omitted). To determine what process is constitutionally due, we must consider three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the

government's interest. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

III.

Onstine argues that the defendants deprived him of his property right in his job without due process when they placed him on unpaid sick leave on December 9, 1995, after Onstine failed to provide a medical evaluation of his mental fitness to return to duty. We find, however, that Onstine was provided all of the process due him under the Fourteenth Amendment.

In Armstrong v. Meyers, 964 F.2d 948, 950 (9th Cir. 1992), we held that "[a] public employer may meet is obligation to provide due process through grievance procedures established in a collective bargaining agreement, provided, of course, those procedures satisfy due process." Here, Articles 19 and 20 of Onstine's collective bargaining agreement (CBA), as well as OARs 577-42-005 through 577-42-025 and 580-21-050, provide for detailed, multi-level grievance and arbitration proceedings. Under the CBA formal grievance procedures, at the first step, a grievance is presented to the appropriate dean, who meets with the grievant, and then issues a written decision. If the grievant is unsatisfied with the result at step one, at step two a request for review may be filed with the Vice President, who meets with the grievant then issues a written decision. If the grievant is still not satisfied, at step three he may file a request for review with the President, who meets with the grievant and issues a written decision. Finally, at step four, a request for review may be filed with the Chancellor, who meets with the grievant and issues a decision in writing. Alternatively, at step four the grievant may give written notice to the President of intent to proceed to arbitration. If the grievant so chooses, a hearing is held before an arbitrator, who must issue a decision in writing, setting forth findings of fact, reasoning, and conclusions.

At the time Onstine received the University's letter of September 20, 1995, informing him that he would be placed on leave without pay beginning December 9, 1995, Onstine could have responded by either providing the University with the requested medical evaluation, or by invoking the above-cited University grievance procedures. It is undisputed that he did neither.

Because Onstine had the ability to seek redress through the CBA grievance procedures, which clearly satisfy due process under Armstrong, we find that Onstine was provided with all of the process due him under the Fourteenth Amendment, and we therefore affirm the lower court's grant of summary judgment for the defendants.

IV.

We note that our decision does not rest upon the parties' compliance, or lack thereof, with the OARs, as we find that none of the cited provisions apply in this situation.

Onstine cites OARS 577-580, which require, in pertinent part, that a written complaint be filed prior to the imposition of disciplinary sanctions on a professor, and that written findings be made regarding the danger presented by a professor prior to any suspension, which must be with pay. Defendants respond by citing OAR 580-21-040, which provides that the University may request a physician's certificate to support a sick leave claim under specified circumstances.

As to the OARs cited by Onstine, we agree with the lower court that the actions taken by defendants did not amount to a "sanction" implicating the procedures outlined therein. With respect to the defendants, we find that their reliance upon the OARs is misplaced, as the rules they cite deal with the situation in which a professor requests sick leave, as opposed to the situation where a professor is put on sick leave by the

University, as was the case here.

V.

Because Onstine has not prevailed on appeal, his request for attorneys' fees on appeal is denied. See 42 U.S.C. § 1988(b).

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Aug 20 1998
Cathy A. Catterson
U.S. Court of Appeals

Onstine v. Ramaley, et al., No. 97-35639

FERGUSON, Circuit Judge, dissenting.

For thirty years, Professor Onstine taught at Portland State University and was in the words of his employer, a "valuable member" of the community. On March 7, 1995, he appeared at work disoriented and acting strangely. Based solely on this single incident, the university made the professor's position and salary contingent upon a mandatory psychiatric evaluation. The university couched this requirement in terms of the safety of the students, the professor, and that of the general public. However, there is no evidence to demonstrate that the professor posed any type of threat to anyone. In fact, on the day of the incident, university psychiatrists concluded that he was not dangerous to himself or others.

Without any process at all, the professor ends up on permanent unpaid sick leave. He has lost his salary, benefits, and the opportunity to continue work, all, it is worth repeating, without any process at all.

The majority excuses all this because of the existence of a collective bargaining agreement between the university and its employees. The agreement provides that it applies only when the aggrieved professor first files a grievance with the appropriate dean. Because Professor Onstine did not do that, the majority concludes that he has no right to a due process hearing. The majority cites Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992) for the proposition that a public employer may meet its due process obligations through general

procedures established in a collective bargaining agreement. That case has no bearing here because in Armstrong, the only remedy that employees had was a collective bargaining agreement. Here the professor has a remedy under state law. Armstrong itself noted this distinction. It stated that in a case involving only a collective bargaining agreement, cases involving due process under state law are not applicable. The State of Oregon has detailed administrative rules, specifically for Portland State University, which are mandated by Oregon legislation. See Oregon Revised Statutes Chapter 351.

Section 577-41-010 of the Rules provides that professors may be sanctioned only for cause. The only grounds for cause stated in the rules which could possibly apply to Professor Onstine is a refusal to leave the university premises when ordered to do so because of posing a threat to personal safety, property, or activities on the premises. However, no one claims that the professor ever refused to leave when ordered to do so. In fact, no such order was ever made.

Section 577-41-015 requires that complaints which may warrant the imposition of sanctions must be filed in writing with the president of the university or his deputy. The complaint must be in writing and state specific facts which constitute grounds for the imposition of sanctions. The professor must be sent a copy of the complaint. The university must explore the possibility of a mutually acceptable resolution. If there is non, then the rules provide for a formal hearing.

Nothing mandated by state law was done in this case. No one can seriously contend that permanent sick leave without pay is not a sanction. Sanctions are defined at ADC 577-41-010(3) as follows: "Sanctions for cause include oral or written warning or reprimand, written censure, removal from an assigned post and reassignment, suspension for a period not to

exceed one year, and termination." If an oral warning is a sanction, then certainly permanent unpaid sick leave is a sanction. The code then proceeds to mandate in detail the proceedings which must be held, non of which were conducted by the university. If the president finds that the continued performance of the professor poses a clear and present danger to the university, professor or public, he may suspend the professor, without financial penalty, from some or all his duties. Only after a formal hearing process, including findings of fact and conclusions of law, can what was done to Professor Onstine be accomplished.

The majority concedes that the professor had a property interest in his job under Oregon law and that this property interest was taken away from him. The majority, however, decree that Professor Onstine was deprived of that interest by due process of law because he did not provide the university with a requested medical evaluation nor ask for a grievance proceeding under the collective bargaining agreement. However, the law of Oregon does not require Professor Onstine to do either. Oregon law places the burden upon the university to establish the due process requirements. The professor need not do anything until the due process proceedings are in place,

Of course, the university and Professor Onstine could have agreed that the due process requirements or Oregon Law were waived and the parties could proceed under the collective bargaining agreement. However, that was never done, and the record is void of any suggestion that the matter was even considered by anyone.

Professor Onstine was deprived of his livelihood after thirty years of being a valued member of the academic community. The defendants denied him the most fundamental basis of all law--due process, which is equated with justice.

The due process requirements that must be accorded college professors in Oregon are not insurmountable. All that must be done is to obey the law. I therefore dissent.

APPENDIX B

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Sep 25 1998
Cathy A. Catterson
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 97-35639
BURTON W. ONSTINE,	)
Plaintiff-Appellant,	)
vs.	) ORDER
	)
PORTLAND STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY; MICHAEL REARDON; RODERIC DIMAN; MARVIN KAISER; GARY L. SCOTT; MARY BETH COLLINS; CONRAD SEIBER,	)
Defendants-Appellees.	)
	)

Before: ALARCON, FERGUSON, and BRUNETTI, Circuit Judges.

Judge Alarcon and Judge Brunetti have voted to deny appellant's petition for rehearing. Judge Ferguson has voted to grant the petition for rehearing. Appellant's petition for rehearing is DENIED.

SUPREME COURT, U.S.

98 1114 DEC 28 1998

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No._____

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OCTOBER TERM, 1999

BURTON W. ONSTINE,

Petitioner,

v.

JUDITH A. RAMALEY, et al., individually and in their official capacities as employees of Portland State University

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX E:

Sanction and Grievance Procedure Sections of Professor Onstine's American Association of University Professors Collective Bargaining Agreement with Portland State University.

SUPPLEMENTAL

APPENDIX C

C-1

FILED
97 Jun -6 AM 11:40
Clerk U.S. District Court
District of Oregon
Portland, Oregon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BURTON W. ONSTINE, Plaintiff, v. PORTLAND STATE UNIVERSITY and the OREGON STATEBOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY, MICHAEL F. REARDON, RODERIC DIMAN, MARVIN KAISER, GARY L. SCOTT, MARY BETH COLLINS, and CONRAD SIEBER, all individually and in their administrative capacities as employees or agents of Portland State University, Defendants.	) Civil No.96-460-AS) JUDGMENT OF DISMISSAL

ASHMANSKAS, Magistrate Judge:

By Opinion and order issued this date, Plaintiff's motion (#59-1) for summary judgment or, in the alternative, motion (#59-2) for summary adjudication, is DENIED. Defendants' cross-motion (#67-2) for summary judgment is GRANTED. Consequently,

IT IS SO ORDERED AND ADJUDGED that Plaintiff's complaint and action are DISMISSED with prejudice and pending motions, if any, are DENIED as moot.

Dated this 6th day of June, 1997.

/s/_____

DONALD C. ASHMANSKAS
United States Magistrate Judge

C-3

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Clerk U.S. District Court
District of Oregon
Portland, Oregon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BURTON W. ONSTINE, Plaintiff, v. PORTLAND STATE UNIVERSITY and the OREGON STATEBOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY, MICHAEL F. REARDON, RODERIC DIMAN, MARVIN KAISER, GARY L. SCOTT, MARY BETH COLLINS, and CONRAD SIEBER, all individually and in their administrative capacities as employees or agents of Portland State University, Defendants.	) Civil No.96-460-AS) ORDER

ASHMANSKAS, Magistrate Judge:

For the reasons stated in the accompanying Opinion, Plaintiff's motion (#59-1) for summary judgment or, in the alternative, motion (#59-2) for summary adjudication, is DENIED. Defendant's cross-motion (#67-2) for summary judgment is GRANTED.

IT IS SO ORDERED and DATED this 6th day of June, 1997.

/s/_____

DONALD C. ASHMANSKAS
United States Magistrate Judge

SUPPLEMENTAL
APPENDIX D

D-1

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Clerk U.S. District Court
District of Oregon
Portland, Oregon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BURTON W. ONSTINE, Plaintiff,	)
v.	) Civil No.96-460-AS
PORTLAND STATE UNIVERSITY and the OREGON STATEBOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY, MICHAEL F. REARDON, RODERIC DIMAN, MARVIN KAISER, GARY L. SCOTT, MARY BETH COLLINS, and CONRAD SIEBER, all individually and in their administrative capacities as employees or agents ofPortland State University, Defendants.	) OPINION

ASHMANSKAS, Magistrate Judge:

Plaintiff, Burton W. Onstine ("Plaintiff"), a tenured professor of political science, filed this action against a number of Portland State University ("University") officials alleging that they violated his civil rights under 42 U.S.C. δ 1983 and his procedural due process rights afforded him under the Oregon Administrative Rules when they placed him on unpaid sick leave in December 1996. Presently before the court are cross-motions for summary judgment.

BACKGROUND

Plaintiff was hired by the University in September 1965. He is presently a tenured professor in the Political Science Department of the University. The defendants named in this action are Judith A. Ramaley, then President of the University; Roderic Diman, Vice Provost for Academic Affairs at the University; Marvin Kaiser, Dean of the College of Liberal Arts and Sciences at the University; and Gary L. Scott, Chair of the Department of Political Science (collectively "Defendants").

On March 6, 1995, Plaintiff called in sick to the University. Plaintiff was not scheduled to teach any classes on March 6, 1995, but was scheduled to teach the morning of March 7, 1995. On March 7, 1995, Plaintiff was seen exemplifying psychotic-type behavior. Witnesses indicated that he was talking like a duck, stalking furniture, clapping his hands in a dark room, dancing and singing down the hallway, talking about going with the flow, making whoosh sounds and engaging in conversation that did not make sense. Even though he was present at the University, Plaintiff did not attend his morning class.

In response to Plaintiff's odd behavior, defendant Scott contacted University security personnel who in turn contacted Dr. Conrad Seiber, a psychologist employed by the University as counselor. Dr. Seiber located Plaintiff and attempted to engage him in conversation. After 20 minutes, Plaintiff became able to respond to Dr. Seiber in a minimally coherent manner. At this time, Dr. Seiber convinced Plaintiff to accompany his to the counseling department offices which offered a more private setting. Dr. Seiber had limited experience in dealing with individuals engaging in psychotic behavior and requested the assistance of Dr. Mary Beth Collins, who was also employed in the University's counseling and psychological services department. Dr. Collins conversed with Plaintiff for a period of time and recommended that Plaintiff go to the hospital or a health center. Plaintiff refused these options but did indicated that he would be willing to make an appointment with a physician that he had seen before to meet over coffee. Plaintiff finally agreed to go home and a cab was called to provide Plaintiff transportation to his home. Neither Seiber or Collins felt that Plaintiff was a danger to any third party but they were concerned that Plaintiff was unable to adequately care for himself in his altered state of mind and considered Plaintiff a danger to himself. Plaintiff apparently returned to the University in the afternoon and met briefly with Scott but no additional incidents were reported. Despite the fact that Plaintiff had additional classes to teach and final examinations to administer over the next two weeks, Plaintiff did not return to the University. In addition, other than his

meeting with Dr. Seiber, Plaintiff does not recall his activities on March 7, 1995, and denies the aberrant behavior ever occurred.

Scott, as Plaintiff's immediate supervisor, investigated the appropriate manner in which to respond to Plaintiff's bizarre behavior. Initially, Scott attempted to discuss the situation with Kaiser, who was too busy to provide much advice. Scott then discussed Plaintiff with Diman, who was primarily responsible for dealing with personnel issues on behalf of the University. Scott's initial concern was how he would handle Plaintiff's students, classes and final examinations if Plaintiff failed to return. Scott also wanted advice on the appropriate way to handle Plaintiff's return to the classroom at the end of Spring Break.

Scott and Diman collaborated on a letter that was sent to Plaintiff under Scott's signature on March 10 and again on March 17, 1995. This letter read:

> The department and the University are concerned about your well-being and about your ability to resume your teaching schedule for Spring term, 1995. The events of the last few days and the comments of students and parents of students concerning your class compel me to set the following conditions prior to your return to the classroom.
>
> Your return to full-time responsibilities will be contingent upon providing me

> with a written evaluation of your condition made by a competent mental health professional. If this cannot be done by the beginning of classes for Spring term, i.e., by March 27, 1995, I will place you on sick leave.
>
> If you do not have a professional contact, there is a University employee assistance program and I am including a descriptive brochure.
>
> Please contact me with any concerns or questions.
>
> Sincerely,
>
> Gary L. Scott, Chair
> Political Science Department

Prior to receiving the letter, Plaintiff contacted Scott by telephone and requested that he be relieved from the responsibility of teaching one of his classes scheduled for spring term 1995. Then, in response to Scott's letter, Plaintiff wrote to Scott on March 23, 1995:

> Thank you for your thoughtful letters of March 10, 1995 and March 27, 1995 received March 23, 1995.
>
> I deeply appreciate your concern for my welfare.

> I accept with alacrity your kind offer to place me on sick leave for Spring Term, 1995.
>
> Sincerely yours,
>
> Burton W. Onstine

Scott received Plaintiff's letter prior to the start of spring term and then did not have any further contact with Plaintiff until May 25, 1995, when he wrote Plaintiff about the 1995-96 academic year:

> Enclosed is the schedule of courses in your areas of expertise for the academic year 1995-96.
>
> Because you were on sick leave I put the schedule together from your 1994-95 schedule of courses. Though the courses for Fall term cannot be changed at this point, there is till time to rearrange things for Winter and Spring terms. However, before you return to teaching, I must have a written evaluation of your condition, made by a competent mental health professional, as I requested in my letters of March 10 and 17, 1995. (See attached.) Please submit this evaluation by ***August 1, 1995.***
>
> Sincerely,

Gary L. Scott
Professor and Chair

On August 8, 1995, Diman contacted Plaintiff by letter which read:

> Dear Professor Onstine:
>
> During the Spring term 1995 you were placed on sick leave. The requirement was made that you provide an evaluation from a competent mental health professional as to your mental condition and the appropriateness of your returning to your full-time responsibilities for the Fall Quarter, 1995.
>
> I understand that you have not provided this documentation, and I must reiterate that it is necessary before you will be allowed to return to your duties.
>
> If I can be of any assistance in this matter, please feel free to contact me.
>
> Sincerely,
>
> Roderic D. Diman
> Vice Provost

On August 12, 1995, Plaintiff apparently

responded to Diman's letter with the following letter addressed to Scott:

> Dear Professor Scott:
>
> The press of duties and circumstances have made it impossible for me to take the last two sabbaticals that I might otherwise have been entitled and which I believe you encouraged me to take.
>
> I propose that I take a sabbatical at full pay for the Fall Term 1995 and another sabbatical Winter Term 1996 at full pay. Please remember that there are precedents in our Department, College, and the University for such sabbaticals.
>
> Further, I suggest that I will be looking forward to a greatly reduced teaching load Spring Term 1996. I suggest that I teach that term the following classes only:
>
> Media and Politics
> Western European Governments
>
> I will be abroad from August 13, 1995 until September 8, 1995. As I will be away for a while any PSU matters that might need my addition, you might consider contacting Charles D. Bates,

attorney at law, 140 S.W. Arthur, Suite 300, Portland, OR 97201.

I have enclosed several documents that might interest you.

Thank you for your consideration in the above matters.

Sincerely,

Burton W. Onstine

Scott replied:

I have received your letter of August 12, 1995, in which you suggest that you would like a sabbatical leave for two terms and that you would also like a reduced teach load for Spring Term 1996.

Before we can discuss possible leaves or your teaching load, I need the written evaluation of your ability to return to work that Vice Provost Diman referred to in his August 8, 1995 letter, a copy of which I have enclosed. After I have it, you may begin the sabbatical application process. However, you must remember that sabbaticals are not a right, but must be based on an

> academic plan that demonstrates that the sabbatical will increase one's effectiveness. Sabbaticals can't be carried over or stockpiled; thus a two-term sabbatical may only be at 75 percent salary regardless of when a past sabbatical occurred.
>
> From your letter I assume that you are not planning to return for the fall term. I am taking steps to cover the courses which you are scheduled to teach. I will continue your absence as sick leave.
>
> Sincerely,
>
> Gary L. Scott, Chair

On September 20, 1995, Diman forwarded the following letter to Plaintiff:

> Dear Professor Onstine:
>
> The chair of your department has informed me that he has received no answer to his letter requesting that you provide him with a written evaluation of your ability to return to classroom duties.
>
> This is to inform you that, since we had not received the documentation of

your ability to perform your responsibilities, effective September 16, 1995, you were again placed on sick leave, that we have designated your leave as Family Medical Leave, and that according to records in the Payroll Office, your accrued sick leave will run out December 8, 1995. If we do not hear from you, beginning December 9, 1995 through June 15, 1996 you will be placed on leave without pay. If by June 15, 1996 you have not contacted the University and provided the requested evaluation, we will proceed to terminate your employment.

Please contact me to discuss this matter. You have been a valuable member of our community, and we want to help in any way that we can.

Sincerely,

Roderic D. Diman
Vice Provost

On October 23, 1995, Ramaley executed the Notice of Appointment appointing Plaintiff to a political science professorship for the academic year beginning September 16, 1995, and ending June 15, 1996.

In early November 1995, Plaintiff requested a

psychiatric evaluation from David B. Jarvis, M.D., of Seattle, Washington. Plaintiff informed Dr. Jarvis that the University had required Plaintiff to provide a written evaluation from a mental health professional indicating that Plaintiff was capable of performing all of his required work duties. However, during the examination and interview, Plaintiff did not reveal or discuss with Dr. Jarvis the March 7, 1995 incident which gave rise to the University's request for the mental health review. However, he did tell Dr. Jarvis that he was under a lot of stress and was worn out and that was why he wanted to go on sick leave.

On November 18, 1995, Dr. Jarvis indicated in a letter addressed "To whom it may concern" that:

> I have seen Burton Onstine for psychiatric evaluation, and have found no basis for making a diagnosis of psychosis, personality disorder, or organic brain disease. While he has experienced some feelings of depression and anxiety, the nature and severity of his symptoms do not, at this time, meet the criteria for a diagnosis of a depressive or anxiety disorder.
>
> I find no medical/psychiatric reasons that would prevent him from returning to full academic duties at this time.

Plaintiff did not forward the letter to the University and the University was not aware of the existence of the letter prior to filing of the amended

complaint on November 4, 1996.

On December 1, 1995, in light of the upcoming change in Plaintiff's status, Diman wrote Plaintiff the following letter:

> As I indicated to you in my letter dated September 20, 1995, accrued sick leave available to you will be exhausted December 8, 1995, and you will be placed on leave without pay beginning December 9, 1995.
>
> I am at a loss to explain your failure to contact me, the dean of the college or your department head to discuss whatever concerns or difficulties have arisen. Please feel free to get in touch with any one of us.

Plaintiff filed this action on March 28, 1996.

LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure allows the granting of summary judgment:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 [c]. "[T]he requirement is that there

be no genuine issue of material fact." Anthes v. Transworld Systems, Inc., 765 F. Supp. 162, 165 (Del. 1991) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original).

The movant has the initial burden of establishing that no genuine issue of material fact exists or that a material fact essential to the nonmovant's claim is absent. Celotex v. Catrett, 477 U.S. 317, 322-24 (1986). Once the movant has bet its burden, the onus is on the nonmovant to establish that there is a genuine issue of material fact. Id. at 324. In order to meet this burden, the nonmovant "may not rest upon the mere allegations or denials of [its] pleadings," but must instead "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex, 477 U.S. at 324.

An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute could affect the outcome of the case. Anderson, 477 U.S. at 248. Factual disputes are genuine if they "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. On the other hand, if after the court has drawn all reasonable inferences in favor of the nonmoving party, "the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

DISCUSSION

Plaintiff alleges that Defendants violated 42 U.S.C. δ 1983 when they removed Plaintiff from the classroom, banned him from his teaching duties and placed him on sick leave without notice of any charges

against him, an opportunity to review the evidence against him, or an opportunity for a hearing. For this claim to succeed, Plaintiff must have had a property interest in his job s an active teaching professor.

The Fourteenth Amendment protects against the deprivation of property or liberty without due process. Brady v. Gebbie, 859 F.2d 1543, 1547 (9th Cir. 1988), cert. Denied, 489 U.S. 1100 (1989). An employee has a protected interest in continued employment only if the employee has a "reasonable expectation or a 'legitimate claim of entitlement' to it, rather than a mere 'unilateral expectation.'" Id. at 1547-48. As explained in Brady, whether an Oregon public employee has a property interest in continued employment depends on state law:

> A legitimate claim of entitlement arises if it is created by "existing rules or understandings that stem from an independent source such as state law." Thus, [s]state law defines what is and what is not property" that is subject to the due process clause of the Fourteenth Amendment. Brady, 859 F.2d at 1548 (citations omitted).

Further, not all state-created property interests rise to the level of constitutionally protected interests. Id. at 1548 n.3.

Under Oregon law, public employee tenure rights arise solely from statute of duly adopted regulations. In Papadopulos v. Oregon State Board of Higher Ed., 14 Or. App. 130, 511 P.2d 854 (1973),

cert. denied, 417 U.S. 919 (1974), the court explained:

> [I]n Oregon, public employee tenure rights arise solely from statutes or...regulations adopted pursuant to a statutory delegation of authority... It is these tenure rights based on statute or regulation that create property interests that cannot be withdrawn without due process hearing.

Id. at 168-69 (emphasis added.)

There is no dispute that Plaintiff had a property interest in his employment at the University. The issue before the court is whether the actions of the Defendants deprived Plaintiff of such property interest.

Plaintiff complains that Defendants removed him from the classroom, banned him from teaching and placed him on sick leave. The evidence before the court establishes that Plaintiff called in sick on March 6, 1995, and voluntarily did not attend classes for the remainder of winter term 1995 despite the fact that he was scheduled to teach classes and give and grade final examinations. Plaintiff was advised by Scott that, if he intended to return to teach spring term 1995 classes, he would have to provide a written evaluation of his condition. In the alternative, Plaintiff would be placed on paid sick leave. Plaintiff eagerly accepted the offer of sick leave for spring term. In response to correspondence from Scott and Diman reiterating the need for a medical evaluation prior to fall term 1995, Plaintiff requested that he be allowed to take a sabbatical for both fall term 1995 and winter term

1996 and that he be given a reduced case load when he returned for spring term 1996. Plaintiff was not removed from the classroom or banned from teaching by Defendants. To the contrary, Plaintiff voluntarily relinquished his rights to teach classes through spring term 1996. In addition, Plaintiff specifically accepted the offer of paid sick leave for spring term 1995.

As noted above, Plaintiff requested that he be allowed to take a sabbatical for fall term 1995 and winter term 1996. Scott conditioned his consideration of Plaintiff's request on Plaintiff providing the previously written evaluation of Plaintiff's condition. At this point, the written evaluation requirement was not preventing Plaintiff from return to work because Plaintiff had already indicated that he did not intend to teach again until spring term 1996. Instead, the written evaluation became a condition to Plaintiff's request for a sabbatical.

Plaintiff also contends that the University's transferring him from "paid" to "unpaid" status was a sanction that triggered his procedural due process rights under the Fourteenth Amendment and the applicable state regulations. The court does not agree. Plaintiff informed the University that he did not intend to teach classes fall term 1995 or winter term 1996. Thereafter, he was advised that his paid sick leave would end on December 8, 1995. Plaintiff did not contact the University to complain about his unpaid leave status nor did he do anything to pursue his paid sabbatical request. The unpaid leave status was not a sanction, it was merely the result of Plaintiff's inactivity.

The regulations relied on by Plaintiff required

the University to file formal charges and conduct a hearing before sanctions may be imposed against a tenured professor. Prior to the hearing, no restraints shall be placed on the processor in the absence of a finding by the president of the University that the professor's continued performance of his duties creates a clear and present danger of harm to the University, the professor or the public. OAR 580-21-335. The court finds that these regulations never came into play in this instance in light of the fact that Plaintiff voluntarily withdrew from his teaching duties and was never sanctioned. Defendants' request for a written evaluation from a mental health professional was reasonable under the circumstances. Plaintiff's aberrant behavior on March 7, 1995, followed by his absence from his classes for the remainder of the week and Dr. Seiber and Dr. Collins concern for Plaintiff's safety, justified Defendants' request to insure that Plaintiff was receiving treatment for his condition and as a safety measure for the University students and the general public. The court likens this situation to that addressed by the Ninth Circuit Court of Appeals in Yin v. California, 95 F.3d 864 (9th Cir. 1996) and, while recognizing that there is no statutory provision for a medical examination in this instance, finds that the traditional employer-employee relationship and Plaintiff's behavior, which relates to his ability to perform his responsibilities as a professor, sufficiently reduced Plaintiff's expectations of privacy and constitutional protection to allow Defendants to require the mental health examination.

The court finds that Defendants did not deprive Plaintiff of any protected interests under either

the Fourteenth Amendment or the state regulations application to tenure professors. Accordingly, the court finds that Plaintiff is unable to state a claim for violation of his procedure due process rights or violation of his civil rights pursuant to 42 U.S.C. δ 1983.

CONCLUSION

Plaintiff's motion (# 59-1) for summary judgment or, in the alternative motion (# 59-2) for summary adjudication, is DENIED. Defendants' cross-motion (# 67-2) for summary judgment is GRANTED.

Dated this 6th day of June, 1997.

/s/_____
DONALD C. ASHMANSKAS
United States Magistrate Judge

SUPPLEMENTAL
APPENDIX E

COLLECTIVE BARGAINING AGREEMENT

between

PORTLAND STATE UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

and

PORTLAND STATE UNIVERSITY

December 1, 1993 through June 30, 1995

defined in Article 4, Section 8. All such rights, powers, authority and responsibilities are retained by the University subject only to those limitations expressly imposed by this Agreement. Without limiting the foregoing, the University expressly reserves the right to make final decisions with respect to members to appoint, reappoint, promote or aware indefinite tenure to them.

Article 18. PROGRESSIVE SANCTIONS

The University shall review to determine if this Article is to be invoked.

Section 1. Cause. If a member is subject to sanction for cause, cause for the imposition is defined as follows:

a. Failure to carry out responsibilities as defined in Article 4, Section 8.

b. Failure to perform the responsibilities of an academic staff member, arising out of one's particular assignment, toward students, toward the academic discipline, towards colleagues, or toward the institution in its primary educational and scholarly functions and secondary administrative functions of maintaining property, disbursing funds, keeping records, providing living accommodations and other services, sponsoring activities, and protecting the health and safety of persons in the institutional community. Evidence to demonstrate cause under the standard set forth in this subsection

may include, but is not limited to, evidence of incompetence, gross inefficiency, default of academic integrity in teaching, research, or scholarship, and intentional or habitual neglect of duty. (Although the effect of absence of teaching and/or research faculty is difficult to measure, unauthorized or unjustified absence from class, research, counseling activities or other scheduled duties in excess of five (5) consecutive schedule or regular work days is sufficient basis for monetary sanction.

c. Cause as defined in OAR 580-21-325 (1)(a) and (b) and OAR 577-41010(2)(b) and (c).

Section 2. Progressive Imposition of Sanctions: Sanctions Available. Recognizing the importance of counseling in the schemes of corrective discipline, the parties agree that counseling will take place before sanctions are imposed. Further, the parties agree that sanctions, when imposed, will progress from minor to severe for repeated failure to meet professional obligations. However, in some circumstances, actions or omissions, which have resulted or will result in irreparable harm to the academic community or members thereof, may require the imposition of severe sanctions in the first instance. Sanctions shall include oral reprimand, oral reprimand with notation to the personnel file, written reprimand, suspension with pay, denial of salary increase, suspension without pay, denial of promotion, reduction in pay, reduction in rank and discharge.

Section 3. Procedures for the Imposition of Sanctions.

a. **Sanction of Oral Reprimand.** The sanction of oral reprimand may be imposed by the appropriate administrative officer if the officer believes that there is cause to warrant the sanction. The sanction of oral reprimand must be imposed within 90 days of the appropriate administrator's knowledge of the act, failure to perform, or condition on which sanction is based.

b. **Sanctions More Severe than Oral Reprimand.** Complaints alleging that an academic staff member has engaged in conduct such as to warrant the imposition of sanctions more severe than oral reprimand shall be filed with the President of the University or a designee. Such complaints shall be in writing and shall state specifically the facts believed to constitute the grounds for the imposition of such sanctions. Upon receiving such written complaints, the President or designee shall promptly refer it to an appropriate administrative officer and shall also have a copy of the written complaint delivered to the academic staff member in person or sent by certified mail to a last known address. If the administrator finds that there is no basis for a sanction the administrator shall notify affected parties thereby terminating the process. The administrative officer shall fully explore the possibility of a settlement mutually acceptable to the academic staff member and the officer. If no mutual settlement is effected, the following procedures shall apply.

1. **Written Reprimand.** If in the judgment of the administrative officer to whom the complaint has been referred, the preponderance of the evidence supports the complaint against the academic staff member, the officer may determine that the imposition of a sanction of written reprimand is warranted. After one (1) year from the date of a written reprimand or notation of an oral reprimand, if no further sanction has been imposed against a faculty member, the written reprimand or notation shall be removed from the member's file.

2. **Sanction More Severe than Written Reprimand.** If the administrative officer believes that a sanction more severe than a written reprimand is called for, a notice of intent to impose severe sanction shall be served either personally upon the member or by certified mail (return receipt requested) to the member's address of record. The notice shall contain a description of the alleged act(s) or omissions(s), date(s), time(s), place(s) and proposed sanction. In addition, the notice must inform the individual of procedural protections available including the right to a review and an opportunity for hearing before a committee of peers prior to the imposition of

sanctions and the right to file a grievance at Step Two subsequent to the imposition of sanctions.

c. Suspension of the faculty member during the pendency of proceeding is justified only if immediate harm to the member or others is threatened by the member's continuance.

d. Within five (5) days of receipt of notice to impose severe sanction of member may request a review and a hearing by an ad hoc committee of peers. The committee shall be constituted as follows: within two (2) working days of the receipt of the request for review, the President shall appoint one member, and the Association shall appoint a second member to severe; the two (2) members thus selected shall, within two (2) days of their selection, choose a third member who shall serve as chairperson. The ad hoc committee shall within ten (10) days of selection review the matter and hold a hearing, if requested, and shall within fifteen (15) days of selection issue a report to the President stating whether in their opinion there is cause to impose the sanction.

e. In the event a hearing is held, the following procedures shall apply.

1. The member shall appear at the hearing and may be accompanied and assisted by other persons, including counsel and the Association.

2. The university shall appear at the hearing and be represented by a person designated by the President. The University's representative may be accompanied and assisted by other persons, including counsel.
3. Hearings shall be open unless closed by request of the member or requirement of law. A verbatim record of all hearings shall be made.
4. During the hearing an opportunity shall be provided for the member and the University's representative to present brief opening and closing statements and for both parties to present evidence and testimony and to call and cross-examine witnesses.
5. The chairperson of the ad hoc committee shall preside at the hearing and over the deliberations of the committee. The chairperson shall have authority to rule upon questions of admissibility of evidence and to exclude evidence which is irrelevant, untrustworthy, and unduly repetitious.
6. The ad hoc committee shall describe the issues considered, make its findings of fact and recommendations based on those findings in a written report to the president.
7. dissenting opinions, if any, by members of the ad hoc committee may be submitted with the report to the President.

f. The President shall upon consideration of the

ad hoc committee's report impose the sanction or conclude the matter.

g. When sanction has been imposed a member may take advantage of the grievance procedure in appealing the actions of the President. In matters not involving academic judgments as defined in Article 19 (GRIEVANCES), Section 3, issues of procedure and substance may be grieved. In matters involving academic judgment issues of procedure and sufficiency of evidence may be grieved.

h. Under no circumstances may the sanction of reduction in rank or discharge be implemented until the individual has exhausted available administrative remedies under this agreement or fails to file a timely appeal from a decision on the grievance.

i. The University and Association agree that the sanction procedures described in this Article shall be in lieu of those procedures described in Division 21, Chapter 580 and Division 41, Chapter 577 of the Oregon Administrative Rules which shall have no application to members of the bargaining unit. Notwithstanding the limitations prescribed in Article 20 (ARBITRATION), the authority of an arbitrator shall extend to the settlement of all issues identified as grievable in this article.

Article 19. GRIEVANCES

Section 1. Purpose. The purpose of this Article is to provide a procedure that will promote prompts and efficient investigation and resolution of grievances. The parties encourage informal resolution of grievances whenever possible and to that end encourage open communication between members and administrators so that resort to formal procedure will not normally be necessary. The University is not obligated to observe any other procedure for the resolution of grievances as that term is hereby defined.

Section 2. Resort to Other Procedures. If, prior to seeking resolution of a dispute by presenting a grievance hereunder, or while the grievance proceeding is in progress, a member seeks resolution of the matter through any agency outside the University, whether administrative or judicial, the University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure or pursuant to Article 20 (ARBITRATION).

Section 3. Definitions.

a. The term "grievance" is defined as an allegation that there has been a violation, misinterpretation or improper application of the provisions of this Agreement. The term "grievance" shall not include complaints related to matters of academic judgment. For the purpose of this Agreement, "academic judgment" shall mean the judgment by faculty and administrators 1) concerning academic standards, competence and performance as these related to appointment, reappointment, promotion, tenure or merit salary increases, and 2) concerning

curricula and educational policy.

b. "Grievant" means one or more members of the bargaining unit or the bargaining unit itself alleging damage or injury by the act or omission being grieved.

c. "Day" means a day when classes or examinations are scheduled and held in accordance with the official academic calendar of the University, excluding Saturdays and Sundays. Summer Session days will not be counted as days for those members not employed during the summer session.

d. "Cognizant Vice President" means the Vice President who is in the reporting line of a given academic staff member or other Portland State University officer with academic rank who reports directly to the President of the University, whether or not such person holds the title of Vice president.

Section 4. General Provisions.

a. A grievant has the right of self-representation at any step in the grievance procedure and at any formal step may choose to be accompanied or represented by counsel or any other person.

b. The Association has the right to be present at, and to participate in, any formal step in the grievance procedure, but shall not interfere with the right of self-representation.

c. A faculty member who is serving as grievance officer and files a grievance on his/her own behalf shall relinquish the role of grievance officer for the bargaining unit until dispute has been settled.

d. The parties may agree to modify the time limits in any step of the grievance procedure. At formal steps, agreement to modify time limits shall be in writing.

e. Failure at any step of this procedure to request review of a decision within the specified time limits, including any extensions thereof, shall be considered acceptance by the grievant of the decision rendered at the previous step. Failure of the administration to communicate the decision on the grievance at any step within the time limits, including any extension thereof, shall allow the grievant to proceed to the next step.

f. No member may take a grievance to arbitration except with the approval and participation of the Association.

g. All grievances which proceed to formal settlement procedures, all requests for review and all arbitration actions shall be submitted on forms attached to this Agreement as Appendices B, C, and D, respectively, and shall be signed by the grievant. The University may refuse consideration of a grievance not filed in accordance with this Article.

h. If the matter is being grieved relates to an act or omission by a Vice President or the President, the grievance may be presented at Step Two or Step Three, as appropriate, but in the manner provided at Step One.

i. A grievance may be withdrawn by a grievant at any time.

j. A grievance may not be presented under this Article for an act or mission which occurred prior to the effective date of this Agreement.

Section 5. Presentation of Grievances.

General. Time is of the essence in the presentation of grievances. The time limits provided below for the initial presentation of a grievance are measured from the date of the act, omission or commencement of condition upon which the grievance is based or from such later date that the member knew or reasonably should have known of the act, omission or commencement of the condition upon which a grievance is based. In no event, however, will a grievance be presented more than 120 days after the act, omission or commencement of the condition on which the grievance is based. The 120 day limit will be extended for those members who are out of the country or are on an official leave of absence so that the member will have a reasonable time after returning to campus to present a grievance.

Informal Procedure. The grievant and, if needed by the grievant to facilitate resolution, a member of the Association, may discuss the grievance with the

administrator most directly concerned in an attempt to resolve the grievance informally.

A grievance may be presented informally within twenty (2) days of the act, omission, or commencement of the condition on which the grievance is based. The grievant should apprise the administrator that the matter being presented is a grievance arising under the terms of this Agreement in order to distinguish the matter from a noncontractual complaint. The administrator to whom the grievance is presented shall communicate a decision to the grievant within five (5) days of the presentation of the grievance.

Formal Procedure. If the matter is not satisfactorily resolved by informal means, the following formal grievance procedure may be involved.

Step One. A grievance shall be presented to the appropriate dean within forty (40) days of the act, omission or commencement of the condition on which the grievance is based. The grievance shall be presented on the grievance form (Appendix B). The grievance shall set for the act, omission or condition on which the grievance is based, the date thereof as precisely as possible, the specific provision of this agreement which is in dispute, and the remedy sought.

Upon the grievant's written request, fifteen (15) days postponement of formal consideration shall be allowed for a further attempt to achieve informal resolution of the grievance.

The appropriate dean shall meet with the grievant

within five (5) days of receipt of grievance form (Appendix B), or within five (5) days of the expiration of the period of time allowed to Step One for informal resolution. The dean shall send a decision in writing to the grievant and the Association within ten (10) days of this meeting.

Step Two. If the grievant is not satisfied with the decision at Step One, a request for review (Appendix C) may be filed with the cognizant Vice President within ten (10) days of date of the decision at Step One. The cognizant Vice President or a designee shall meet with the grievant within five (5) days of receipt of the request for review to discuss the grievance. The cognizant Vice President shall send his or her decision concerning the grievance in writing of the grievant and to the Association within ten (10) days of such meeting.

Step Three. If the grievant is not satisfied with the decision at Step Two, a request for review (Appendix C) may be filed with the President or designee within ten (10) days of the date of the decision at Step Two. The President or designee shall meet with the grievant within ten (10) days of receipt of this request, and the President or designee shall send a decision in writing to the grievant and to the Association within ten (10) days of such meeting.

Step Four. If the grievant is not satisfied with the decision at Step Three, a request for review (Appendix C) may be filed with the Chancellor within ten (10) days of the decision at Step Three, OR with the approval of the Association the grievant may give written notice (Appendix D) to the President or

designee of intent to proceed to arbitration. Notice of intent to arbitrate must be filed with the President of the University within twenty (20) days of date of the decision at Step Three.

If a request for review is filed with the Chancellor, the right to arbitrate the grievance is thereby waived. The chancellor or a designee shall meet with the grievant within ten (10) days of receipt of a request for review, and the chancellor or designee shall send a decision in writing to the grievant and to the Association within ten (10) days of such meeting.

As used in this Section, the date of filing of a request for review shall be the date that the form (Appendix C) is received in the administrative office. The date of the decision is the date the decision is sent to the grievant. Dates of filing and dates of decisions shall be entered into a log maintained for that purpose and signed by the person who actually received or sent the document being logged.

Article 20. ARBITRATION

Section 2. Arbitration of Grievances. If a grievance brought under Article 19 (Grievances) is not resolved at Step Three of that procedure, the association may submit the matter to arbitration. Notice of intent to arbitrate (Appendix D) must be filed with the President of the University within twenty (20) days of the date of the decision at Step Three. If no notice of intent to arbitrate is filed within the time limit, the right to arbitrate is thereby waived.

Section 2. Matters within the scope of Article 21

(CONTRACT MATTERS: RESOLUTION OF DISUPTES) may be submitted to arbitration if not resolved in the manner provided in Article 7 (CONSULTATION). Notice of intent to arbitrate must be served on the opposing party within twenty (20) days of the last consultation meeting at which the issue was discussed.

Section 3. Within ten (10) days of receipt of notice of intent to arbitrate, the parties shall meet to attempt to agree with an arbitrator. If the parties are unable to agree upon an arbitrator within five (5) days of the meeting, the party initiating arbitration shall request the American Arbitration Association to submit a list of five (5) arbitrators, none of whom shall be an employee of the Oregon State System of Higher Education unless both parties have agreed to the contrary.

Each party shall alternately strike a total of two (2) names from the list of five (5); the remaining person shall be selected as the arbitrator. The party initiating the arbitration shall strike the first name.

If the arbitrator selected cannot hold the hearing or render a decision within the time limits provided herein and either party does not agree to an extension of time, a new list of five (5) names shall be requested from the American Arbitration Association and the selection procedure as provided herein shall be repeated.

Section 4. Submission Agreement. Within ten (1) days of receipt of notice of intent to arbitrate, the parties shall meet to draft a submission agreement.

They shall attempt to agree on the precise issue to be submitted to arbitration, stipulation of facts, joint exhibits and any other matter designed to expedite the arbitration process.

If the parties are unable to agree on the precise issue to be submitted, each party shall submit its own version of the issue to be decided. The arbitrator shall then decide the precise issue to be arbitrated. Such decisions shall be made prior to determining arbitrability.

Section 5. Conduct of the Hearing. The arbitrator shall hold the hearing in Portland, Oregon unless otherwise agreed to by the parties. The hearing shall commence within sixty (60) days of the arbitrator's acceptance of the case, unless both parties agree to an extension of time.

/s/_____
DONALD C. ASHMANSKAS
United States Magistrate Judge